PUBLIC PROSECUTOR v. CHIN CHEE THAU

[A.Cr.J. (Raja Azlan Shah J.) February 25, 1969]
[Raub — Criminal Appeal No. 5 of 1968]

Road Traffic — Charge — Dangerous driving — Notice of intended prosecution given for alleged "careless driving" — Offence under s. 36(1) — Whether prosecution maintainable — Road Traffic Ordinance, 1958, ss. 35, 36 and 56.

Criminal Law and Procedure — Raising question of notice — When more convenient.

The respondent was charged with an offence of driving a motor vehicle in a manner dangerous to the public under section 35(1) of the Road Traffic Ordinance, 1957. He was earlier served with a notice of intended prosecution which alleged an offence for driving without due care, an offence under section 36(1) of the Ordinance. At the trial the learned magistrate acquitted the respondent without his defence being called as he held that the provisions of section 56(1) of the Road Traffic Ordinance, relating to the notice of intended prosecution had not been complied with. The public prosecutor appealed.

Held, allowing the appeal: (1) the notice of intended prosecution need specify only the nature of the alleged offence and not the particular offence itself;

(2) while the service of the notice is mandatory the provisions with regard to specifying the alleged offence and time and place of accident is only directory;

(3) in this case sufficient notice had been given to the respondent and the order of acquittal must therefore be set aside.

Cases referred to:—

(1) *R.* v. *Edmonton Justices, ex parte Brooks* [1960] 2 All E.R. 475.

(2) *Public Prosecutor* v. *Voon Tiek Yong* [1963] M.L.J. 117.

(3) *Milner* v. *Allen* [1933] 1 K.B. 698.

(4) *Public Prosecutor* v. *Shepherd* [1964] M.L.J. 80.

(5) *Sandland* v. *Neale* [1955] 3 All E.R. 571, 573.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamed Nizar bin Idris (Deputy Public Prosecutor) for the appellant.

M. Gomez for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: The respondent was a driver of a motor vehicle which met with an accident on 28th January 1968. On the following day he was served with a notice of intended prosecution under section 56(1) of the Road Traffic Ordinance, 1958 which reads:—

"That it is intended to take proceedings against you for an offence of MENJALANKAN MOTOR CAR NO. BL. 3233 DENGAN TIADA CHERMAT MENYEBABKAN KEMALANGAN under section 36(1) of the Road Traffic Ordinance, No.49/1958".

However, he was charged with "driving in a manner dangerous to the public" under section 35(1) of the said Ordinance. At the hearing the learned magistrate acquitted the respondent without his defence being called. It is against this acquittal that the public prosecutor appeals.

In acquitting the respondent the learned magistrate held that the provisions of section 56(1) of the Ordinance had not been complied with. He took the view that the notice of intended prosecution was defective in that it specifically mentioned an offence under section 36(1) whereas he was actually charged in court with an offence under section 35(1). He seemed to think that it would prejudice the respondent to face a more serious charge than what was intended in the said notice.

The learned magistrate in his judgment said that on the facts he would have called for the defence under section 35(1) had the provisions of section 56(1) been complied with. He was not disposed to amending the charge for that would be to correct something which had been wrongly done by the prosecution.

Before dealing with the appeal, I would like to deal with a point of practice. In the present case the question of notice was raised at the end of the prosecution case. No doubt there is no objection to raise the question of notice at any stage of the trial e.g., during the cross-examination of the appropriate prosecution witnesses (see *R.* v. *Edmonton Justices, ex parte Brooks* (1)) or at the end of the prosecution case (see *Public Prosecutor* v. *Voon Teik Yong* (2)) but it will be more convenient if it is raised as a preliminary issue so that if the issue is decided in favour of the applicant, recourse to prove the case will not be necessary.

I now turn to the merits of the appeal. While it is not irregular to prefer a charge of "driving without due care and attention" although the offence referred to in the notice is "driving in a manner dangerous to the public" (see *Milner* v. *Allen* (3)), can the same be said if the case is the other way round? In other words, can the prosecution prefer a serious charge of "driving in a manner dangerous to the public" under section 35(1) when the notice specifically mentioned a lesser offence of "driving without due care and attention"? That is the point for determination in the present appeal.

The learned deputy argues in the affirmative. He submitted that while the service of the notice is mandatory the provisions with regard to specifying the alleged offence and the time and place of accident is only directory. I agree with that contention. The case of *Public Prosecutor* v. *Shepherd,*(4) though it was concerned with insufficient particularity as to the date and time of the accident, can by analogy be applied to the present case.

In my judgment the notice need not be as precise as the summons; it is the summons that must be precise. The notice is merely to refresh the offender's mind as to the facts which may be the substance of a charge. Its object is to acquaint the offender promptly that he may be prosecuted so that he may be able to collect material for his defence while the matter is still fresh in his mind and that of potential witnesses; so the sooner the notice is given the better. (See *Sandland* v. *Neale* [5]).

In dealing with the particularity of the notice required under section 56(1) the words are *inter alia* "specifying the nature of the alleged offence" and not "specifying the offence" or "the particular offence". In my opinion, those words do not necessarily mean that a notice must be a notice of the particular section of the Ordinance under which the prosecution is contemplated. Nor do I held the view that at the time when that notice was given it was necessary that the police officer or other authority should have definitely made up his mind which particular charge was to be preferred. Only the "nature of the alleged offence" and not the particular offence itself need be specified.

For the above reasons, I would allow the the appeal, set aside the lower court's order of acquittal and direct that the defence be called.

Appeal allowed.

Solicitors: *Khoo & Sidhu.*

PUBLIC PROSECUTOR v. TAN KIM CHOK

[R.Cr.J. (Chang Min Tat J.) October 1, 1968]
[Ipoh — Criminal Revision No. 16 of 1968]

Criminal Law and Procedure — Sentence of whipping — Accused over 50 years of age — Criminal Procedure Code (Cap. 6), s. 289.

The accused had been sentenced to 4 months imprisonment and 2 strokes of the rattan. The accused was over 50 years of age.

Held: the sentence of whipping was in breach of section 289 of the Criminal Procedure Code and must be set aside.

CRIMINAL REVISION.

M. Mahalingam (Deputy Public Prosecutor) for the applicant.

Respondent in person.

Chang Min Tat J. (delivering oral judgment): The sentence passed on the accused in this case of four months imprisonment with effect from the date of arrest and two strokes of the rattan was brought to my notice by the trial president of the Sessions Court. Subsequent to passing the sentence the learned president realised that the sentence was in breach of section 289 of the Criminal Procedure Code. The accused was clearly a man above 50 years of age and should not be subject to any whipping by reason of his age. The order of whipping therefore cannot stand. The sentence of imprisonment as to four months from the date of his arrest was obviously arrived at because of the sentence of whipping. It is manifestly inadequate but in view of the undertaking by the accused that he would not molest his wife in future, I shall not increase the sentence except to make it run from the date of conviction.

Order accordingly.

PUBLIC PROSECUTOR v. YUEN PENG LAM

[R.Cr.J. (Chang Min Tat J.) October 1, 1968]
[Ipoh — Criminal Revision No. 17 of 1968]

Criminal Law and Procedure — Sentence — Fines — Default sentences should run consecutively — Courts Ordinance, 1948, s. 102(c).

The learned magistrate had in imposing fines on two charges against the respondent ordered that the sentences in default of payment should run concurrently.

Held: the order was wrong and in contravention of section 102(c) of the Courts Ordinance, 1948 and therefore should be varied, so as to make the default sentences run consecutively.

CRIMINAL REVISION.

Chang Min Tat J. (delivering oral judgment): The order of the learned magistrate making the default sentences on the two charges to run concurrently is wrong and is in contravention of section 102(c) of the Courts Ordinance 1948. The learned magistrate has now referred this matter for revision. Accordingly I set aside the order of concurrency and substitute therefor an order that the default sentence run consecutively.

Order accordingly.

NASIB SINGH v. RAMASAMY

[A.C.J. (Ibrahim J.) October 5, 1968]
[K.L. — Civil Appeal No. 26 of 1967]

Practice and Procedure — Illegality — Not pleaded — Illegality brought to attention of court — Duty of court — Promissory note in English language not attested — Moneylenders Ordinance, 1951, s. 27.

Moneylenders — Promissory note — Not attested — Illegality not pleaded.

This was an appeal against the decision of the President, Sessions Court, Kuala Lumpur, dismissing the claim of the appellant for $1,870.70. The learned president found that the respondent did not under-